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10
11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**

13 * * *

14 SCOTT FRANCIS NOVAK,

Case No.: 3:20-cv-00586

15 Plaintiff,

16 vs.

VERIFIED COMPLAINT

17 THE CITY OF RENO, a political subdivision
of the State of Nevada; and DOES 1 through 10
18 inclusive;

JURY TRIAL DEMANDED

19 Defendants. _____/

20 COME NOW, SCOTT FRANCIS NOVAK, an individual (“Novak” or “Plaintiff”), by
21 and through the undersigned counsel, and file the following complaint seeking redress for the
22 violation of Novak’s right to just compensation for the taking of private property for public use
23 in violation of the Fifth Amendment of the United States Constitution and the Nevada
24 Constitution by THE CITY OF RENO, a political subdivision of the State of Nevada; and
25 DOES I through X, inclusive.

26 / / /

27 / / /

28 / / /

JURISDICTION

1
2 1. This Court has subject matter jurisdiction over Plaintiff's claims pursuant to 28
3 U.S.C. §§ 1331 and 2201(a). There is federal question jurisdiction under 28 U.S.C. § 1331
4 because the Plaintiff allege violations of the federal Constitution. Plaintiff seek a declaration of
5 their rights pursuant to the Federal Declaratory Judgment Act, 28 U.S.C. § 2201. This Court has
6 supplemental jurisdiction over Plaintiff's state law claims pursuant to 28 U.S.C. § 1367(a)
7 because they are part of the same case and controversy as Plaintiff's federal law claims.

8 2. This Court has personal jurisdiction over Defendants because (a) they are located
9 in the District in which this action was filed; and (b) the actions giving rise to these claims
10 occurred in and/or were directed from this District.

11 3. The City of Reno may be directly sued in Federal Court under the provisions of
12 42 U.S.C. § 1983 for violating the Plaintiff's rights under the 5th Amendment. *Knick v. Twp. of*
13 *Scott*, 139 S. Ct. 2162, 2164 (2019).

VENUE

14
15 4. Venue is proper pursuant to 28 U.S.C. Section 1391 in the District of Nevada
16 because the acts giving rise to the Plaintiff's claims occurred in this District.

PARTIES

17
18 5. Novak currently resides, and at all times relevant hereto resided, in Washoe
19 County and own the property located at 9525 Freemont Way St. in Washoe County, Nevada
20 (hereinafter, "Property").

21 6. The City of Reno is a local government and is a political subdivision of the State
22 of Nevada.

BACKGROUND FACTS

23
24 7. Swan Lake and Silver Lake occupy the lowest points of the eastern Lemmon
25 Valley Hydrological Basin and western Lemmon Valley Hydrological Basins respectively in the
26 "North Valleys", an area northwest of Reno in Washoe County.

27 8. The North Valleys include areas within the jurisdictions of the City of Reno,
28 Washoe County, and the United States Bureau of Land Management.

1 9. The Eastern Lemmon Valley Hydrological Basin, containing Swan Lake, is a
2 closed basin with an area of approximately 42 square miles.

3 10. Hydrologically and geographically, a “closed basin” means any water that comes
4 into the basin, by precipitation or importation, has no natural exit or outflow. It therefore pools
5 in the lowest point, Swan Lake, until it can naturally evaporate or infiltrate into the ground.

6 11. In its natural state, the only water introduced into Lemmon Valley would be
7 annual precipitation. That rain or snow would fall on the natural, pervious desert surface, be
8 absorbed to recharge ground water supplies, or run through natural courses to the playa bottom
9 of the basin.

10 12. Natural soil and non-improved land has an estimated infiltration and absorption
11 rate of approximately 60-90%, meaning that soil can absorb 60-90% of rain fall precipitation.

12 13. The level of water in Swan Lake depends on the amount of water introduced into
13 the Basin, the ability of surface water to infiltrate into the ground, and the extent of evaporation
14 in the playa.

15 14. Over the 50 years prior to 2017, Swan Lake would typically dry out during the
16 summer months when Northern Nevada receives less precipitation. This allowed the basin to
17 maintain adequate storage capacity to handle precipitation without causing flooding to the areas
18 outside the natural lake boundary.

19 15. The annual Swan Lake level can be adversely influenced by man-made alterations
20 to the natural water cycle, including the importation of water, discharge of treated effluent into
21 the playa, and replacing natural desert landscape with impervious materials such as buildings,
22 roads, and parking lots.

23 16. The 2017 “water-year” is defined as the period October 1, 2016 to September 30,
24 2017. During the 2017 water year, winter storms brought precipitation to Northern Nevada.

25 17. Precipitation measured at the Reno-Stead fire station, near Swan Lake, showed
26 less precipitation fell in Lemmon Valley in the 2017 water-year than fell in other relatively recent
27 water-years, including 1986, 1994, and 2006.

1 18. Although there was less precipitation in Lemmon Valley than in previous years,
2 Swan Lake and Silver Lake rose above their natural and man-made boundaries and flooded
3 private properties surrounding the lakes.

4 19. The amount of precipitation that fell during the 2017 storms was within the
5 amounts of precipitation for which engineers plan in designing development according to
6 Washoe County and City of Reno approved design manuals.

7 20. The 2017 storm event was not unprecedented, rather it was a foreseeable natural
8 event.

9 21. In February 2017, Washoe County determined that nearly ninety (90) private
10 properties around Swan Lake had flood water on them and warned that it expected more
11 impacts from flooding including failed septic systems and contaminated domestic wells.

12 22. As of March 12, 2017, a Federal Emergency Management Administration
13 (FEMA) response team documented sixty-six (66) Lemmon Valley buildings with actual or
14 threatened structural damage.

15 23. At the end of March 2017, Washoe County ordered the installation of HESCO
16 barriers, which are temporary, sand- or gravel-filled, four-foot high, aggregate walls, to protect
17 some of the properties around Swan Lake.

18 24. As of April 1 2017, sixty-one (61) individuals had been displaced from the
19 Lemmon Valley area, one hundred sixty (160) homes were reported to have septic issues, and
20 potable water had to be provided for use by area residents.

21 25. The effects of the flooding that began in 2017 in Lemmon Valley were long
22 lasting, as lake water level did not naturally fall to pre-flooding conditions. The level of water in
23 Swan Lake was higher in 2019 than it had reached at the height of flooding in 2017.

24 **DEVELOPMENT OF THE SWAN LAKE BASIN**

25 26. Beginning in the 1980s, residential and commercial development increased in the
26 Lemmon Valley. This development effectively changed the southern end of the Swan Lake
27 Basin from a rural area to a mixed suburban and commercial area over the past forty (40) years.
28

1 27. The introduction of more development and people living, working, and doing
2 business in the Basin required the importation of millions of gallons of water for drinking,
3 cleaning, landscape irrigation, and commercial uses.

4 28. That imported water never leaves the Basin in measurable quantities and adds to
5 the annual storage requirements of Swan Lake.

6 29. Between 1986 and 2017, the City of Reno approved development in Lemmon
7 Valley that resulted in approximately 1000 acres being transformed from water absorbing desert
8 to impervious concrete, asphalt, and other impervious surfaces.

9 30. Impervious surfaces have an assumed infiltration and absorption rate of less than
10 15%. This means that 85% of water that falls on an impervious surface runs off the property
11 downhill.

12 31. To address the needs of residential and commercial development in Lemmon
13 Valley, the City of Reno operated and maintained a wastewater treatment facility, the Reno Stead
14 Wastewater Reclamation Facility (“RSWRF”) in the immediate vicinity of Swan Lake. RSWRF
15 treats sewer and grey water before discharging it into a City maintained conveyance ditch which
16 eventually leads to Swan Lake. RSWRF has been continuously, and ever-increasingly,
17 discharging such water since the early 1980s.

18 32. The City of Reno annexed thousands of acres of property in Lemmon Valley to
19 facilitate private and municipal development. Once planned or developed, the City of Reno
20 accepted the dedication of the public facilities within developments, such as streets, storm
21 drains, and sewer infrastructure for public use.

22 33. The City of Reno built, accepted dedication of, and maintained a network of
23 storm water conveyance systems of drains, catch basins, channels, pipes and outlets, all
24 emptying to Swan Lake, to drain storm water runoff from the impervious areas in Lemmon
25 Valley created by development.

26 34. The City of Reno also built, accepted dedication of, and maintained a wastewater
27 conveyance system to transport sanitary sewer influent from both the Silver Lake Basin and the
28 Swan Lake Basin to RSWRF for treatment and discharge to Swan Lake.

1 35. The wastewater conveyance system in the Silver Lake Basin was designed,
2 constructed and maintained by the City of Reno to transfer flood waters from Silver Lake Basin
3 to Swan Lake Basin in the event Silver Lake flooded.

4 36. In addition, for every new development the City of Reno approved, there was a
5 resultant increase in water importation into the Basin, further adversely impacting the natural
6 hydrological cycle of evaporation and infiltration.

7 37. The City of Reno required importation of water through the building permit
8 process for private or commercial development in the North Valleys.

9 38. The City of Reno was first placed on notice of the issue of development and its
10 impacts on storm water and wastewater storage in the late 1980s. Various engineers and a state
11 mandated commissioner identified problems related to development, water importation and
12 flood storage capacities of the playa lakes in the North Valleys.

13 39. Three engineering studies between 1986 and 2016 placed the City of Reno on
14 notice that engineered, designed and constructed water mitigation projects would be required to
15 allow for development in the North Valleys without impacting existing property owners around
16 Swan Lake.

17 40. The City of Reno's consulting engineers made it aware of the inevitable flooding
18 issues in Lemmon Valley created by development at least three times in the years before the
19 2017 flood began.

20 41. In an effort to mitigate potential flooding in the area, the City of Reno adopted
21 "low impact development standards" (LID), which required builders to implement certain
22 structures or systems to reduce environmental impact, e.g., the implementation of water efficient
23 restrooms.

24 42. The City of Reno did not enforce its LID standards. In a survey of the properties
25 in the City of Reno built between 2002 and 2017, the City of Reno admitted that more than two-
26 thirds of approved development properties had not included volume mitigation required by the
27 LID standards.

1 43. Ninety percent of the developments approved by the City of Reno had no
2 effective flood mitigation improvements that would protect downstream residents from the
3 impacts of development.

4 44. The City of Reno continued approving plans for development, including
5 approving an 800,000 square-foot commercial facility adjacent to Swan Lake after the flooding
6 problems in 2017.

7 45. The City of Reno approved at least thirty-five (35) large scale development
8 projects between 2002 and 2017.

9 46. The City of Reno specifically owns and maintains property on which three (3)
10 major channels direct storm water from developments within City jurisdiction to Swan Lake: (a)
11 Horse Creek (or no name creek), which runs from Stead Boulevard past the Reno Stead
12 Wastewater Reclamation Facility (“RSWRF”) and into Swan Lake; (b) a drainage channel in the
13 vicinity of Military Road and Mahon Drive, which drains to Swan Lake; (c) and the Lemmon
14 Drive Drainage channel, which runs from Lemmon Valley Drive in the area south of Swan Lake
15 and into Swan Lake.

16 47. Both residential and commercial properties, plans for which were approved by
17 the City of Reno, drain storm water into those conveyances that are public improvements
18 owned and maintained by the City of Reno.

19 **OPERATION OF RSWRF CAUSES FLOODING IN SWAN LAKE**

20 48. The City of Reno also owns and operates RSWRF, which is a public
21 improvement that provides sewer service for commercial and residential properties in the Silver
22 Lake and Swan Lake basins, treats that sewage, and discharges treated effluent water into ditches
23 and channels that lead to Swan Lake.

24 49. In the past, commercial and residential development in Lemmon Valley was
25 limited by the amount of potable water available to serve the area. Development in Lemmon
26 Valley was made possible by importing potable water into the basin to serve those properties.

27 50. At the time of the 2017 Flood, the Nevada Department of Environmental
28 Protection (NDEP) permitted RSWRF to process a 30-day average of 2.35 million gallons/day

1 (“MGD”) of treated effluent which is discharged into a City maintained ditch leading to Swan
2 Lake. The NDEP further prohibited any discharge greater than 4.13 MGD.

3 51. The City of Reno is permitted by the State Water Engineer to discharge treated
4 effluent into the creeks and ditches that lead to Swan Lake in no more than 336 acre-feet
5 annually for use on a nature preserve.

6 52. The NDEP permit expressly provides that it does not grant the City of Reno any
7 right to invade or damage any private property by its discharge of water through RSWRF.

8 53. Between December 2016 and April 2017, RSWRF discharged effluent
9 significantly in excess of its NDEP permitted amount.

10 54. Between December 2016 and April 2017, RSWRF discharged nearly twice the
11 permitted amount of annual water allowed by the State Water Engineer.

12 55. Between December 2016 and April 2017, RSWRF discharged effluent in excess
13 of an amount it could accurately measure for more than seven (7) days. The measuring devices
14 for effluent discharge to Swan Lake at the RSWRF facility were limited to 3.2 MGD. Between
15 December 2016 and April 2017, an internal gauge at RSWRF measured a flow of over 7 MGD,
16 at different points in time.

17 56. During 2017, Silver Lake, in the hydrological basin adjacent to Swan Lake, was
18 also experiencing extremely high water-levels.

19 57. The City was aware from engineering studies prior to 2017 that water from Silver
20 Lake basin should not be intended or designed to be transferred to Swan Lake basin without
21 mitigation.

22 58. Using a sewer lift station built at the corner of Moya and Lear Boulevard, the City
23 of Reno pumped sewer water, storm water, and water from Silver Lake to RSWRF and
24 discharged that water into creeks and ditches leading to Swan Lake through RSWRF. This active
25 pumping resulted in superinduced water moving from Silver Lake to Swan Lake beginning in
26 February 2017 and lasting for nearly 18 months.

27 59. The City of Reno’s sewer lift station at the intersection of Moya and Lear was
28 built below ground and proximate to Silver Lake in a manner that it was foreseeable that a storm

1 event would have caused water from Silver Lake to inundate the lift station, requiring the
2 pumping that actually occurred. In other words, it was foreseeable that in the event of a
3 substantial storm event, the lift station at Moya and Lear could be used to lower the water-level
4 of Silver Lake at the expense of Swan Lake, and this occurred.

5 60. The City of Reno used the Moya lift station to pump in excess of 279 acre-feet of
6 water from Silver Lake to Swan Lake in 2017 and an additional 185 acre-feet in 2018.

7 61. The City of Reno was substantially involved in the development of private land in
8 Lemmon Valley, including, but not limited to, its approving plans and accepting dedication of
9 storm and wastewater discharge systems and by building its own storm water and wastewater
10 systems in Lemmon Valley to facilitate such development and to convey increased runoff
11 created by development to Swan Lake, causing the Plaintiff's property to flood.

12 **FLOODING OF NOVAK' PROPERTY**

13 62. Novak purchased the real property at 9525 Freemont Way, Reno, Nevada ("the
14 Property") in November of 2015.

15 63. The Property was a single-family residence on .206 acres located at approximately
16 4920' elevation.

17 64. Novak lived on the Property as of December 2016.

18 65. In Novak's neighborhood, drainage culverts normally carry rainwater into a
19 drainage ditch on Lemmon Drive to empty into Swan Lake.

20 66. As Swan Lake's level rose beginning in December 2016, water could no longer
21 flow into the Lake and it flowed back across Lemmon Drive and into the Plaintiff's
22 neighborhood.

23 67. Water from Swan Lake physically invaded Novak's property beginning in January
24 2017.

25 68. Swan Lake continued to rise and crested above Lemmon Drive which is located
26 at an elevation of 4922' in January to September 2017.

27 69. Swan Lake water levels continued to rise until a peak of approximately 4923.5' in
28 April 2017.

1 70. Water contiguous to Swan Lake physically invaded Novak's Property between
2 January 2017 and September 2017 to a depth of not less than two feet.

3 71. Surface water cut off access to Novak' Property beginning in January 2017.

4 72. Surface water made Novak' septic system unusable beginning in January 2017.

5 73. As a direct result of the surface water flooding on Novak' Property, Washoe
6 County Building Department issued a 'red-tag' for the Property. A 'red-tag' expressly states that
7 the Property was "UNSAFE-Do not enter or occupy." The Property was inspected, found to
8 be seriously damaged and unsafe to occupy.

9 74. As a direct result of the surface water flooding on Novak's Property, Washoe
10 County Health District issued notice and recommendation to vacate the property as unsanitary
11 and unsafe to occupy.

12 75. Novak was physically displaced from the Property from mid- January of 2017
13 until September of 2017 because the house was uninhabitable due to flood waters and/or
14 damages.

15 76. Novak incurred in excess of \$100,000 in out-of-pocket expenses related to repairs
16 to the home and replacing items lost or destroyed in the flood and materials to repair the house.

17 77. Novak spent hundreds of hours repairing damage to the Property.

18 78. Displacement of Novak from his home caused great emotional and mental
19 anguish.

20 79. Experts have opined that the soils under Novak' residence are saturated due to
21 the extent and duration of the flooding event. The saturated soils have moved as they swell and
22 shrink with moisture content resulting in movement of Novak' residence. This movement will
23 continue for months or years to come and cause recurring damage to the structures on the
24 Property.

25 80. The City of Reno caused a physical invasion of superinduced water to the
26 Plaintiff's real and personal property that resulted in a barrier to access and the effectual
27 impairment of the use and enjoyment of the Property for a substantial period of time.
28

1 members' private properties for public use. The City admitted and conceded that no formal
 2 condemnation proceedings had been initiated, no payments had been made, and that the class
 3 representatives were owners of the properties they claimed were flooded.

4 88. The state court judge issued *Findings of Fact and Conclusions of Law* ruling that the
 5 City had physically invaded the class members' property with water from Swan Lake resulting in
 6 a compensable taking.

7 89. After the liability verdict in favor of the class members, the City moved to
 8 decertify the class for the purposes of damages trial only in November 2019.

9 90. On July 6, 2020, the state court agreed to decertify the class for the purposes of
 10 damages trial only and that the issue of legal liability was determined conclusively to all class
 11 members.

12 91. For the purposes of statute of limitations, all periods between October 30, 2017
 13 and July 6, 2020 are tolled as a matter of law for each member of the class action.

14 CLAIMS FOR RELIEF

15 42 U.S.C. § 1983 - VIOLATION OF THE TAKINGS CLAUSE OF THE FIFTH 16 AMENDMENT

17 92. Plaintiff repeats and realleges the allegations set forth in the foregoing Paragraphs
 18 as though fully set forth herein.

19 93. The Fifth Amendment to the United States Constitution provides in relevant
 20 part: "[N]or shall private property be taken for public use, without just compensation."

21 94. Defendant took the Plaintiff's private Property for public use.

22 95. Defendant has not instituted formal proceedings to take the Plaintiff's real or
 23 personal property.

24 96. Defendant has not paid just compensation to the Plaintiff for the taking of
 25 Plaintiff's real or personal property.

26 97. By its conduct, as described herein, Defendant is liable to the Plaintiff under 42
 27 U.S.C. § 1983 for taking the Plaintiff's property for public use without first paying just
 28 compensation by physical invasion of water resulting from active pumping and discharge of

1 water; failure to design, engineer, construct or maintain storm water and wastewater
 2 conveyances in a manner as not to foreseeably flood private property; and through acceptance
 3 of dedications and annexation of infrastructure to transport storm water and wastewater from
 4 one private property to another.

5 98. Defendant City of Reno has directly acted to and developed, implemented,
 6 enforced, encouraged and sanctioned express and implied de facto policies, practices, and/or
 7 customs of unlawfully using the Property of others for the storage of floodwaters without
 8 having first paid just compensation.

9 99. The Constitutional abuses and violations by Defendant City of Reno were and
 10 are directly and proximately caused by policies, practices and/or customs developed,
 11 implemented, enforced, encouraged and sanctioned by the City of Reno, including its practice
 12 and policy of unlawfully using the Plaintiff' Property as storage for its flood waters.

13 100. Pursuant to 42 U.S.C. § 1983, Plaintiff seek and are entitled to declaratory relief
 14 declaring that the acts of the City described herein violate the United States Constitution.

15 101. Pursuant to 42 U.S.C. §§ 1983 and 1988, Plaintiff are entitled to money damages
 16 for the unconstitutional taking of their property as well as declaratory relief.

17 102. Plaintiff are therefore entitled to an award of attorneys' fees and costs pursuant to
 18 42 U.S.C. § 1988.

19 103. In addition to the relief requested above, the Plaintiff requests relief as described
 20 in the prayer for relief below.

21 **VIOLATION OF THE TAKINGS CLAUSE OF THE NEVADA CONSTITUTION**

22 104. Plaintiff incorporates all preceding paragraphs as though each were fully set forth
 23 verbatim herein.

24 105. The Defendant's acts and/or omissions described above constitute a taking of
 25 the Plaintiff' property in violation of Article 1, Section 8(3) of the Nevada Constitution.

26 106. The Plaintiff has a real or personal interest in the property taken by the
 27 Defendants.

28 107. The taking of the Plaintiff's property was for public use.

119. The Defendant substantially changed, wrongfully appropriated, damaged and/or maliciously destroyed the Plaintiff's personal property causing great inconvenience.

120. The above-described actions by Defendant amount to the conversion and/or malicious destruction of the Plaintiff's personal property.

121. As a direct and proximate result of the Defendant substantially changing, damaging and destroying the Plaintiff's personal property, the Plaintiff has suffered and continue to suffer damages.

NUISANCE

122. Plaintiff incorporates all preceding paragraphs as though each were fully set forth verbatim hereat;

123. Defendant by their own actions, as described above, substantially and unreasonably interfered with the Plaintiff's use and enjoyment of their property for which the Plaintiff actually possess;

124. These actions by Defendant amount to a private nuisance; and

125. As a direct or proximate result of the private nuisance brought to the Plaintiff's property by the Defendant, the Plaintiff has suffered and will continue to suffer damages.

WHEREFORE, the Plaintiff request that this Court:

- A. Enter a declaratory judgment that the actions complained of herein are unlawful and violate the United States Constitution;
- B. Order Defendant to pay just compensation to Plaintiff in amounts to be proven at trial;
- C. Order Defendant to pay compensatory and consequential damages in an amount to be proven at trial;
- D. Order Defendant to pay attorneys' fees and costs of the action pursuant to 42 U.S.C. § 1988, or state law;
- E. Order Defendant to pay pre- and post- judgment interest at the legal rate on such damages as appropriate; and
- F. Grant any further relief that the Court deems just and proper.

1 **DATED** this October 16, 2020

2
3 By: _____

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Exhibit List

1. Verification